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**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982**

W.J. ESTELLE, JR.,

Petitioner

V.

ALBERT H. CARTER,

Respondent

**On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are *Burks v. United States*, 437 U.S. 1 (1978), and
Greene v. Massey, 437 U.S. 19 (1978), retroactive?

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TO THE HONORABLE JUSTICES OF THE
SUPREME COURT:

NOW COMES W.J. Estelle, Jr., Director, Texas Department of Corrections, Petitioner herein, by and through his attorney, the Attorney General of Texas, and requests that the Court grant this his petition for writ of certiorari, and as grounds therefor, would respectfully show the Court the following:

OPINIONS BELOW

The United States District Court for the Southern District of Texas, Houston Division, on June 13, 1980, conducted an evidentiary hearing upon Respondent Albert H. Carter's application for writ of habeas corpus

brought pursuant to 28 U.S.C. §2254. At the conclusion of the hearing, the court orally granted the writ of habeas corpus and ordered Respondent released on bond. On July 17, 1980, the court issued an opinion explaining its decision. *Carter v. Estelle*, 499 F.Supp. 777 (S.D.Tex. 1980). (Appendix, hereinafter "App.", A). Final judgement was entered on August 12, 1980. (App. B)

On June 1, 1982, a panel of the United States Court of Appeals for the Fifth Circuit affirmed the judgment. *Carter v. Estelle*, 677 F.2d 427 (5th Cir. 1982). (App. C). That court denied a timely filed petition for rehearing and suggestion of rehearing en banc on November 18, 1982. *Carter v. Estelle*, 691 F.2d 777 (5th Cir. 1982). (App. D).

JURISDICTION

The Court has jurisdiction to review the judgment of the Court of Appeals entered June 14, 1982, and the Court of Appeals' denial of the timely filed petition for rehearing entered November 18, 1982, under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Since this case presents a question of the retroactivity of two of this Court's decisions construing the double jeopardy clause as applied to the states of the United States Constitution, it involves U.S. Const. amends. V, XIV.

STATEMENT OF THE CASE

Carter was convicted of perjury in Cause No. 2158 in the Middle District of Georgia in 1962. In 1969, he was convicted of his second felony offense, embezzlement, in the 174th District Court of Harris County, Texas, in

Cause No. 137,784. For the 1969 conviction, Carter received a sentence of seven years. During his incarceration for the 1969 conviction, he was indicted and convicted in still another case, Cause No. 178,126, again for embezzlement. This third conviction occurred on September 18, 1972, and on October 24, 1972, he was sentenced to life imprisonment. The 1962 and 1969 convictions were used to enhance Carter's sentence to life, and the life sentence was ordered to run consecutively to his seven-year sentence for the 1969 conviction.

Carter appealed his 1972 conviction to the Texas Court of Criminal Appeals. That court reversed his conviction, finding that there was insufficient evidence to establish ownership and control of the money the indictment had charged Carter with embezzling. *Carter v. State*, 510 S.W.2d 323 (Tex.Crim.App. 1974). The Court of Criminal Appeals characterized the evidence as follows:

The State's proof was that Andrew Dolce was the president of Consolidated Productions, Inc., a seller of plastic toys and animals, and the Appellant was employed as a sales representative for that corporation, by virtue of which, so Dolce testified, Appellant became his agent. Appellant's duties consisted of calling on and securing orders for plastic items for schools and related organizations interested in selling the items in fund raising projects. Generally the orders secured were entered on an order form on which there was a prominently printed notice that all checks were to be made payable to Consolidated Productions, Inc.

Some of the checks issued in payment for orders secured by Appellant were made payable to and received by Consolidated Productions, Inc.; however, other checks were made payable to either the corporation and Appellant or to

Appellant and were received by Appellant. These latter checks were deposited in a bank account and withdrawn by Appellant; the proceeds from these checks were not received by the corporation. The office manager of the corporation testified that all payments should have been remitted to the corporation, and that as a result of Appellant's activities, the corporation sustained a loss of approximately forty thousand dollars. Andrew Dolce testified that, although Appellant had authority to receive the checks in his capacity as agent and remit the money to the corporation, he did not give Appellant authority or permission to convert the checks to his own use and benefit. Dolce was not asked if, and he did not testify that, he was the owner of the money alleged to have been embezzled by Appellant, or that, as president of the corporation, he had the care, control and management of such funds.

Carter v. State, 510 S.W.2d 323, 325 (Tex.Crim.App. 1974).

In sum, the State conclusively proved that Carter was stealing money hand-over-first. The State proved that he was stealing it from Consolidated Productions, Inc. The State proved that Andrew Dolce was the president of that corporation. Dolce testified that Carter had no right to appropriate the money to his own use and benefit and that he had stolen it from the corporation. But, in violation of a Texas rule that has since been overruled, see, *Compton v. State*, 607 S.W.2d 246, 249 (Tex.Crim.App. 1980) (en banc) (on motion for rehearing), Dolce did not testify that he was the particular person within the corporation who was the proper custodian of such money. Under the law presently in effect in Texas, there would have been no problem

with the State's proof, for it was evident that Dolce's right of possession to the money was greater than Petitioner Carter's.

There was, however, a problem with the State's case in 1974. The Court of Criminal Appeals ruled that the State's proof was insufficient to show that Andrew Dolce was the "owner" of the property in the manner alleged in the indictment, as then required by Texas law.

Accordingly, the case was remanded to the trial court. Carter filed a "Special Plea" claiming that double jeopardy barred his retrial. The trial court did not specifically pass on the "Special Plea", but Carter was subsequently retried and convicted in 1974 on an identical embezzlement charge. Once again, the 1962 and 1969 felony convictions were used to enhance his sentence to life, this sentence to be served consecutively to the seven year sentence he was already serving for the 1969 conviction.

Carter did not appeal his 1974 conviction. On December 3, 1974, he filed a habeas petition, Cause No. 74-H-1603, attacking the conviction in federal court. After four different amendments by Carter, this petition eventually raised claims attacking the 1974, 1969, and 1962 convictions.

Several years later, in *Burks v. United States*, 437 U.S. 1 (1978), and *Greene v. Massey*, 437 U.S. 19 (1978), this Court ruled that it violates the double jeopardy clause of the United States Constitution to retry a defendant whose initial conviction has been reversed by a state appellate court for insufficient evidence. Eventually, the district court granted habeas corpus relief to Respondent based on retroactive application of the double jeopardy principles established in *Burks* and *Greene*. *Carter v. Estelle*, 499 F.Supp. 777 (S.D.Tex. 1980). (Apps. A,B). The Court of Appeals affirmed this judgment. *Carter v. Estelle*, 677 F.2d 427 (5th Cir.

1982). (App. C). The opinion noted that the principal constitutional issue, involving the retroactivity of *Burks v. United States*, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19 (1978), had been decided in *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982). Bullard's appeal had previously been consolidated and was later severed from Respondent Carter's appeal in the Fifth Circuit. On June 14, 1982, this Court granted Petitioner's petition for writ of certiorari in *Estelle v. Bullard*, _____ U.S._____, 102 S.Ct. 2927 (1982), upon two questions, one of which is identical to the sole issue Petitioner now raises in respondent Carter's case. On January 17, 1983, the Court reversed and remanded the judgment in *Bullard* "for consideration of whether the Texas Constitution, as interpreted by the Texas Court of Criminal Appeals in *Ex Parte Augusta*, _____ S.W.2d_____(1982), offers respondent relief on grounds independent of the United States Constitution so as to render inappropriate a decision on federal constitutional grounds."

On November 18, 1982, the Fifth Circuit denied Petitioner's petition for rehearing and suggestion of rehearing en banc. *Carter v. Estelle*, 691 F.2d 777 (5th Cir. 1982). (App. D).

SUMMARY OF THE ARGUMENT

A.

Since the Court on June 14, 1982, granted certiorari in *Estelle v. Bullard*, No. 81-1774, to review the precise question Petitioner now seeks to present in this case, the Court should defer resolution of this petition pending the outcome of *Estelle v. Bullard*. See, *Estelle v. Bullard*, _____ U.S._____, 102 S.Ct. 2927 (1982), or await the outcome of the Court's remand order entered in *Bullard* on January 17, 1983.

B.

Burks v. United States, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19 (1978), cannot help Respondent Carter unless they are applied retroactively, and it was error for the court below to hold that they should be so applied. Plainly the Court has held that not all double jeopardy decisions are retroactive. The proper test for deciding whether a double jeopardy decision is retroactive under *Robinson v. Neil*, 409 U.S. 505 (1973), emphasizes first the extent of good faith detrimental reliance by law enforcement authorities on the old standards. Here, the good faith aspect of reliance is obvious. The Court found it necessary to overrule many of its own prior cases in handing down the decisions in *Burks* and *Greene*. Those decisions represent a complete reversal of prior precedent.

Detrimental reliance is also shown. Two apparent commonly recurrent prejudicial sets of circumstances emerge. First, at the original trial that ended in reversal, the prosecutor may well have had additional evidence in support of guilt that he would have presented, except that he was totally unaware and could not reasonably have been aware that that was his last opportunity to do so. Under such circumstances, the prosecutor should not be unfairly penalized for having made a good faith legal judgment with a great deal less than knowledge of all circumstances.

Second, and even more likely, if a criminal defendant's sentence is overturned for insufficient evidence, the prosecutor on remand may have more than one option. He may, for example, have had other charges that he could have brought. If he had known that years later *Burks* and *Greene* would be decided, the prosecutor might well have brought other charges. But the prosecutor had no inkling of such legal eventualities, nor can it reasonably

be argued that he should have had such foresight. Detrimental reliance, therefore, is a substantial possibility in many such cases.

C.

Obviously the issue Petitioner presents is an important one. Its resolution will affect the fate of unknowable but significant numbers of state prisoners. The issue is worthy of this Court's review under S.Ct.R. 17.

REASONS FOR GRANTING THE WRIT

A.

RECENTLY THE COURT HAS GRANTED CERTIORARI TO REVIEW THIS CASE.

On June 14, 1981, the Court granted Petitioner's writ of certiorari in *Estelle v. Bullard*, No. 81-1774, to review the precise retroactivity-double jeopardy question Petitioner seeks to raise herein. See, *Estelle v. Bullard*, ____ U.S.____, 102 S.Ct. 2927 (1982). The Court should defer action upon the instant petition pending the outcome of *Estelle v. Bullard*.¹ If the judgment is affirmed in *Bullard*, then it may be appropriate to deny the petition for writ of certiorari in this case. If the judgment in *Bullard* is reversed, however, then it undoubtedly will be proper to grant the writ of certiorari in this case, and reverse and remand the judgment for reconsideration in light of the holding in *Bullard*. The Court may wish to defer consideration of this petition until the Court of Appeals has decided *Bullard*.

1. On January 17, 1983, the Court reversed and remanded the judgment in *Bullard* so that the Court of Appeals might determine whether an adequate state ground independently supports the judgment.

B.

THE HOLDINGS IN *BURKS V. UNITED STATES*,
AND *GREENE V. MASSEY* SHOULD NOT BE
HELD RETROACTIVE.

In *Burks v. United States*, 437 U.S. 1 (1978), and *Greene v. Massey*, 437 U.S. 19 (1978), this Court overruled a long line of its own authorities in order to hold that the Double Jeopardy Clause of the United States Constitution bars retrial when a criminal defendant has obtained an appellate reversal of his case because of insufficiency of the evidence. The Court reasoned that if the evidence were legally insufficient at trial, then theoretically the case should never have been submitted to the jury at all, but instead any defendant who at the close of the State's evidence moved for an instructed acquittal would have been entitled to one.

For this reason, the Court held that all defendants are entitled to the double jeopardy benefits of the State's failure to prove sufficient evidence at its initial opportunity. The Court, however, failed to rule explicitly whether its holding would apply retroactively so as to invalidate the convictions of all defendants who had already been retried and convicted in criminal proceedings supported by sufficient evidence and free of any other constitutional infirmity.

The criteria for determining retroactivity of double jeopardy decisions were set out in *Robinson v. Neil*, 409 U.S. 505 (1973). At issue there was the retroactivity of the double jeopardy holding in *Waller v. Florida*, 397 U.S. 387 (1970).

The Court noted that the analysis embodied in *Linkletter v. Walker*, 381 U.S. 618 (1965), which is based upon protecting "the very integrity of the fact-finding

process,"' *id.* at 639, is "not appropriate" in the context of double jeopardy decisions, *Robinson v. Neil* at 509. The Court continued to note, however, the "element of reliance embodied in the *Linkletter* analysis...".

Thus, the Court, cautioning against the view that its rule of decision "is an ironclad one that will invariably result in the easy classification of cases in one category or another,"' *id.* at 509, suggested a two-prong good faith reliance and prejudice test. This test would focus first on whether the State's reliance on the prior rule was supported by case law such that the new constitu-

2. This analysis, as summarized in *Stovall v. Denno*, 388 U.S. 293 (1967), emphasizes the purpose to be served by the new standards, the extent of reliance by law enforcement authorities on the old standards, and the effect on the administration of justice of a retroactive application of the new standards. *Desist v. United States*, 394 U.S. 244 (1969).

3. Indeed, in the most recent double jeopardy-retroactivity cases located by the State, some have held this Court's double jeopardy decisions to be retroactive, and some refused to do so. In *Mizell v. Attorney General of New York*, 586 F.2d 942 (2d Cir. 1978), *cert. denied*, 440 U.S. 976 (1979), the Court's decision in *Crist v. Bretz*, 437 U.S. 28 (1978), was held retroactive. In *Holt v. Black*, 550 F.2d 1061 (6th Cir.), *cert. denied*, 432 U.S. 910 (1977), the court held *Breed v. Jones*, 421 U.S. 519 (1975), retroactive, whereas a contrary conclusion was reached in *Jackson v. Justices of the Superior Court of Mass.*, 549 F.2d 215 (1st Cir.), *cert. denied*, 430 U.S. 975 (1977). In *United States v. Rumpf*, 576 F.2d 818 (10th Cir. 1976), *cert. denied*, 439 U.S. 893 (1978), the decision in *Abney v. United States*, 431 U.S. 651 (1977), was held to be prospective only. Finally, in *Blackburn v. Cross*, 510 F.2d 1014 (5th Cir. 1975), the court afforded full retroactive status to the collateral estoppel doctrine of *Ashe v. Swenson*, 397 U.S. 436 (1970).

Two other courts have held *Burks* and *Greene* retroactive. The Ninth Circuit did so with no analysis whatsoever in *United States v. Bodey*, 607 F.2d 275 (9th Cir. 1979). And a divided Texas Court of Criminal Appeals so held in *Ex parte Reynolds*, 588 S.W.2d 900 (Tex.Crim.App. 1979), *cert. denied*, 445 U.S. 920 (1980).

tional decision "marked a departure from past decisions of this Court." *Robinson v. Neil* at 511. If so, the State's reliance upon earlier constitutional decisions, both state and federal, would obviously be in good faith. Second, the Court might examine the nature and form of prejudice the State would suffer from retroactive application of the constitutional rule and the extent of the unfairness of such prejudice, compared to the beneficial effect on the valid interests of defendants in such retroactive application.

Applying this test to the facts before it, the Court held *Waller v. Florida* retroactive, stating first that "[the] decision in *Waller* cannot be said to have marked a departure from the past decisions of this Court." *Robinson v. Neil* at 510. The Court in effect held that the State should have realized that municipalities and states were sufficiently parts of one sovereign that criminal prosecution by one would bar later criminal prosecution by the other—the essential holding of *Waller v. Florida*.

By contrast, the decisions of the Court in *Burks v. United States* and *Greene v. Massey* marked a significant departure from prior decisions. The Court itself acknowledged, "The Court's holdings in this area, beginning with *Bryan /v. United States*, 338 U.S. 552 (1950)], can hardly be characterized as models of consistency and clarity." *Burks v. United States*, 437 U.S. at 6. The Court further admitted, "to reach a different result [from the Court of Appeals] will require a departure from the [earlier] holdings." *Id.* To settle the matter the Court stated:

[O]ur past holdings do not appear consistent with what we believe that the Double Jeopardy Clause commands. A close reexamination of these precedents, however, persuades us that they have not properly construed the Clause, and accordingly, should no longer be followed.

Id. at 12. Thus, the Court overruled "two separate lines of cases including one that was launched with considerable fanfare just three years ago." P. Westen & R. Dribel, "Towards a General Theory of Double Jeopardy," 1978 S.Ct.Rev. 81, 82 & n.8.

Obviously, the law in this area before *Burks* and *Greene*—especially insofar as whether seeking an appeal constitutes a waiver of the criminal defendant's double jeopardy rights—was on balance contrary to the newly announced constitutional rule.

Texas law for decades has mirrored federal law in this respect. In a long and unbroken line of cases implementing Tex. Code Crim. Proc. Ann. art. 44.25, and its statutory predecessors, the Texas Court of Criminal Appeals has held that a defendant might be retried for the same offense following a reversal for insufficient evidence.⁴ Thus, under *Robinson v. Neil*, good faith reliance by Texas law enforcement authorities is not only shown, but cannot seriously be questioned.

Clearly, good faith detrimental reliance—*i.e.*, prejudice—could well have been a reality in many cases. First, for example, if Carter or others similarly situated, might have been tried upon other charges following their first convictions, but the State in good faith believed that they might also validly be retried upon the same charge for which a reversal of the conviction had been obtained, then prejudice or detrimental reliance would be shown.

There are many reasons why the State during the second prosecution might address constitutionally sufficient evidence after failing to do so during the first. Of

4. After *Burks* and *Greene* the Court of Criminal Appeals held Article 44.25 unconstitutional to the extent of conflict with decisions of the United States Supreme Court. *Johnson v. State*, 571 S.W.2d 4, 6 n. 2 (Tex.Crim.App. 1978).

some importance is the possibility that the passage of time might produce additional evidence. More significantly, the State often possesses inculpatory and even damning evidence that it chooses not to introduce because it may be held inadmissible on appeal. The evidence may be a fruit of a search that the State fears will ultimately be held improper, or a confession that might on appeal be held coerced. The evidence may be of arguable but less than certain admissibility for many other reasons that may cause the prosecution to seek a conviction without it.

It is also possible that the state may withhold weak but legally sufficient evidence because it chooses to rely in good faith but erroneously upon evidence that ultimately on appeal is held to be inadmissible. See, *United States v. Block*, 590 F.2d 535, 540 n. 12 (4th Cir. 1978); Comment, 31 U.Chi.L.Rev. 365 (1964).

The prosecution, however, could not reasonably have foreseen the constitutional difficulty with retrying Carter and, through no fault of the State, he cannot now be retried for any of such charges, the applicable statutes of limitations having long ago expired.

The Court of Appeals' holding that Petitioner failed to show prejudice is equally unpersuasive. The court in effect held that the State should not be heard to complain of prejudice where it had already had one opportunity to muster its proof. There was almost no discussion of Petitioner's precise claims of prejudice.

This Court plainly stated in *Brown v. Louisiana*, 447 U.S. 323, 327 (1979):

"[I]t is clear that resolution of the question of retroactivity does not automatically turn on the particular provision of the Constitution on which the new prescription is based."

Yet the holding of the Court of Appeals in this case tends toward that precise result.

It should be emphasized that Respondent Carter does not present a case in which doubt has been cast upon the factual accuracy of either the guilty verdict in his first trial or the punishment verdict in his second hearing. In *Ivan V. v. City of New York*, 407 U.S. 203 (1972) [quoted and emphasis added in *Hankerson v. North Carolina*, 432 U.S. 233, 243 (1977)], the Court stated as follows:

Where the *major* purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that *substantially* impairs the truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials, the new rule has been given a complete retroactive effect. Neither good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has suffered to require prospective application in these circumstances. [citations omitted].

The major purpose of the double jeopardy doctrine is not to protect the integrity of the fact-finding process: instead, it is to preclude the State from harassment of an individual by repeated attempts to incarcerate him. *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969); *Green v. United States*, 355 U.S. 184, 187-88 (1957). Indeed, it is fundamental to principles of double jeopardy that it is preferable that a guilty man go free than be subjected to a forbidden second prosecution.

For these reasons, a question as to the accuracy of the guilty verdict based upon legally insufficient evidence is a sound basis for ordering an acquittal upon direct appeal from such a verdict. Perhaps it is even a sound basis for applying *Burks* and *Greene* to the punishment stage of a criminal trial. In Carter's case, however, any

such question has been obviated by his subsequent trial and the presentation of virtually the same evidence. In any event, there is no longer any question whatsoever as to the correct factual basis of his life sentence.

For these reasons, no reasonable imaginable analysis can militate in favor of a holding that *Burks* and *Greene* are retroactive; if *any* double jeopardy decision should be prospective only, this is it. Accordingly, Petitioner suggests that these cases may be held retroactive only by doing what the Court of Appeals erroneously denied it was doing, *i.e.*, establishing a *per se* rule that *all* double jeopardy decisions are retroactive. To say that the result follows from the clause's purpose—to prevent a second trial—is to embrace precisely a *per se* rule. Indeed, some members of this Court recently concurred in a dictum that suggested such a rule in a Fourth Amendment case, *United States v. Johnson*, ____ U.S. ____, 102 S.Ct. 2579, 2587-88 (1982), although also cautioning that the Court meant to "express no view on the retroactive application of decisions construing any constitutional provision other than the Fourteenth Amendment." ____ U.S. at ____, 102 S.Ct. at 2594.

C.

THIS COURT SHOULD REVIEW THIS IMPORTANT ISSUE.

Petitioner cannot know precisely the numbers of convictions that may eventually be invalidated by the holding of the Court of Appeals in this case or similar holdings elsewhere, but each such result is significant. Further, Petitioner submits that both the federal and state judiciary have experienced great difficulty in interpreting and applying *Robinson v. Neil*, 409 U.S. 505 (1973). This case presents an ideal opportunity for the Court to illustrate the proper application of retroactivity principles in a double jeopardy context.

CONCLUSION

For these reasons, Petitioner respectfully prays that this petition for writ of certiorari be held in abeyance until resolution of *Bullard v. Estelle* in the United States Court of Appeals for the Fifth Circuit, and that following the decision in *Bullard*, that the petition for this case be granted, and that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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